INDEX

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

v.

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Executive Jet Aviation, Inc. and Executive Jet Sales, Inc.[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 24, 1971.

OPINIONS BELOW

The opinion of the court of appeals, reported at 448 F. 2d 151, appears in the Appendix hereto (App. A, *infra*, pp. 1a-26a). The unreported opinion of the district court also appears in the Appendix hereto (App. B, *infra*, pp. 27a-42a).

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[1] Hereinafter petitioners will be referred to collectively as "EJA."

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 24, 1971. On September 14, 1971, EJA filed with the court of appeals a suggestion of a party for rehearing in banc and a motion to enlarge time for filing such a suggestion. On October 18, 1971, the court of appeals entered an order granting EJA's motion. As of the date of filing this petition, no action has been taken by the court of appeals on EJA's suggestion for a rehearing in banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

EJA adopts the following statement from Circuit Judge Edwards' dissenting opinion written in this case:

> This case presents a single important question:
>
> Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land? (App. A, *infra*, p. 8a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONST. art. III:

§ 2. *Jurisdiction of Courts*

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .

United States Code (U.S.C.), Title 28:

§ 1333. *Admiralty, maritime and prize cases*

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction. . . .

STATEMENT OF THE CASE

On July 28, 1968, a corporate jet aircraft known as a Falcon Mystere M-20, Registration N367EJ (hereinafter referred to as the Falcon), owned by petitioner Executive Jet Sales, Inc. and operated by petitioner Executive Jet Aviation, Inc. crashed in the navigable waters of Lake Erie after striking several hundred seagulls shortly after takeoff from Burke Lakefront Airport at Cleveland, Ohio (hereinafter referred to as the airport). The airport is owned, operated and maintained by respondent the City of Cleveland, Ohio, and at the time of the crash respondent Phillip A. Schwenz[2] was employed by the City as manager of the airport and was acting in the scope and course of his employment (R. 4, 9).[3] Respondent Howard E. Dicken was employed by the United States Federal Aviation Administration (FAA) at the time of the crash and was acting in the scope of his employment as an Air Traffic Controller when he issued a clearance from the airport tower to the Falcon for takeoff (R. 4, 7).

What happened at the time of this crash is succinctly stated by the two pilots flying the Falcon in a statement given by them two days after the accident to the Naional Transportation Safety Board during the course of the official investigation of this accident (R. 18-20). That statement reads:

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[2] Hereinafter appellees the City of Cleveland, Ohio, and Phillip A. Schwenz will be referred to collectively as "the City."

[3] Record citations refer to pages in the printed Appendix to the Briefs filed in the court of appeals which, together with the Appendix of Photographic Exhibits, was certified and transmitted as the record in this case.

STATEMENT OF WITNESS

July 30, 1968

Pilot Statement: W. P. Flower, P/C
C. Dirck, C/P

The Aircraft—EJ 367—arrived at Burke Lakefront July 26 approximately 1600 hours. It was immediately refueled by Remmert-Warner, secured and the crew departed to the motel. The crew consisted of W. P. Flower, P/C, C. Dirck, C/P, and Miss J. Vargo, Hostess.

On the 28th at approximately 1000 hours, the crew arrived at Lakefront for a ferry flight to Portland, Maine, picking up passengers and continuing to White Plains, N. Y. The aircraft was uncovered and preflighted by the First officer. The Hostess made a final inspection of the cabin in preparation for picking up passengers and the Captain obtained the weather, filed a flight plan, and obtained a release from the Company dispatcher. After engine start we received clearance to taxi to Runway 6 Left. As the flight was non-revenue it is company policy for the first officer to fly in the left seat for proficiency and training. The first officer was flying from the left seat, the captain in the right seat, and the Hostess was seated in the first seat on the right side facing aft.

The check list was completed and on taxiing out, it was noted that one aircraft was on landing rollout on 6 Left, and ground advised an aircraft was on the approach to 6 Right. The ground advised to expedite across 6 Right. At this point there were, to my knowledge, no advisories regarding birds from ground control. In obtaining the weather by phone for Cleveland, Portland, and White Plains, there was no information given regarding birds as would appear on the end of the Cleveland sequence. On instructions, the pilot in

the right seat, switched to tower frequency, and requested take-off. The take-off clearance initially was faded with the final portion of the statement saying something to the effect "Caution, birds *on end* of runway." These exact remarks can be substantiated by the tower tape. The bird caution to me was a routine advisory as would be given for a few or small number of birds. The transmission did not possess extreme hazard information. As the take-off clearance was not clear a second request was made and a second clearance was issued for take-off. Neither pilot could see the birds on the end of the runway. After clearance to take-off was received the pilot in the left seat executed the take-off and rotated at approximately 125 Kts. The pilot in the right seat made a power check, voiced 30 Kts., 100 Kts., V_1 and rotate. The pilot in the left seat could not distinguish the bird line prior to rotation and in his estimation could not abort the take-off. On rotating a sea of birds on the runway became visible. Approaching the birds at approximately 75 feet caused them to flush and fly into the aircraft, apparently hundreds hitting the belly and engine intakes. Bird impact substantially reduced the air speed an estimated 15 or 20 Kts. The pilot in the left seat raised the gear handle, the pilot in the right seat maneuvered the throttles in an effort to obtain partial power. There was almost immediate total loss of power. The engine temperature indicated above 850 degrees on both engines and the RPM dropped rapidly below 70%. The aircraft flew in a semi-stalled attitude stall horn blowing until contacting the water. The aircraft struck the top of a pick-up truck and a portion of the airport perimeter fence. The aircraft contacted the water in a flat attitude and on a second impact water entered the cabin almost immediately. Only a few seconds passed between bird impact and water contact and it is estimated that the aircraft did not attain more than 75 to

100 feet in altitude. After the second impact the pilot went to the rear of the aircraft to release the emergency exit and see if the stewardess was uninjured. The airplane settling in the water apparently exerted some pressure inside and it was impossible to open the right cabin emergency exit. One pilot succeeded in opening the pilot's left window with the fire extinguisher. The other pilot opened the left cabin exit. A small private boat picked up the crew as the aircraft was settling in the water. Approximately the nose cone area remained above the water level. The crew returned to the airport and there were no injuries. The aircraft floated approximately 5 to 10 minutes. No bird dispersing method or system of any kind exists at the airport.

In conclusion, the advisory comment "birds on end of runway", "bird activity" is a caution remark and denoted no extreme hazard to the crew. It has been given routinely to hundreds of departing pilots at Lakefront. The mass of birds that must have been on the runway that would allow an aircraft to strike 314 birds to me denotes an extreme hazard. When an aircraft is cleared to takeoff, the pilot has every right to assume that there are no other aircraft on the runway, that there are no people on that runway or that there are not one thousand birds on the runway. In my estimation the runway should have been closed for departing jet traffic. With that many birds, the runway could never have been considered safe. It would have been helpful if some official survival assistance could have been available from the airport. The Coast Guard apparently does not have direct contact with the tower and it was sometime before they arrived at the submerged aircraft.

/s/ W. P. FLOWER
W. P. Flower

/s/ CHARLES E. DIRCK
C. Dirck

Official accident investigators later counted 314 dead seagulls on the runway (R. 31). They also determined that the aircraft impacted the water at a point located one-fifth of a statute mile from the cyclone fence which marked the airport boundary (R. 43, 44). The waters of Lake Erie are navigable at that point, their depth being estimated at "between 40 and 45 feet" (R. 49). The Falcon sank completely and remained submerged in Lake Erie for more than two days (R. 50, 54). After it was raised an inspection of the aircraft revealed that, among other things, "the fuselage contained severe bending" (R. 60), and the interior of the aircraft (including all electrical components, radios and instruments) "revealed intensive water soaking" (R. 61).[4]

This action was brought within the admiralty and maritime jurisdiction of the United States District Court for the Northern District of Ohio, Eastern Division, by EJA against the City and respondent Dicken[5] to recover for the total destruction of EJA's Falcon, for the loss of use of the aircraft for a period reasonably required to obtain a replacement, and for the salvage, raising and other costs incurred (R. 3-6). The complaint seeks damages in the amount of $1,763,-

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[4] Photographs of the dead birds, the impact point, the cyclone fence and truck struck by the Falcon, the damage to the Falcon and similar matters are shown in the Appendix of Photographic Exhibits.

[5] EJA also filed an action against Dicken's employer, the United States of America, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. That action, identical to the present action against Dicken except for the jurisdictional basis, is still pending in the United States District Court for the Northern District of Ohio, Eastern Division, as Civil Action No. C69-352.

643.64 (with interest), and contains the following allegations, among others:

> 7. On or about July 28, 1968, defendant Howard E. Dicken negligently and carelessly supervised and controlled, or failed to supervise and control, plaintiffs' Falcon; and negligently and carelessly failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which defendant Howard E. Dicken knew or should have known, including a huge flock of seagulls which were sitting on the active runway.
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> 8. On and before July 28, 1968, the city and defendant Phillip A. Schwenz, and each of them, negligently and carelessly operated, controlled, maintained, supervised and inspected the airport; negligently and carelessly failed to remove and eliminate hazards to the aircraft existing on, over and adjacent to the airport, including the aforementioned flock of seagulls; and negligently failed to warn plaintiffs of hazards to aircraft existing on, over and adjacent to the airport of which the city and defendant Phillip A. Schwenz knew or should have known, including the aforementioned flock of seagulls.
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> 9. As a result of the aforementioned negligence and carelessness of defendants, and each of them, plaintiffs' Falcon struck several hundred seagulls shortly after take off from the airport when the flock flushed; and *the Falcon was totally destroyed when it crashed and sank into the navigable waters of Lake Erie* off shore from the airport, all to plaintiffs' damage. . . . (R. 4, 5, emphasis added.)

The City impleaded the United States of America seeking non-contractual indemnity (R. 14-17). After all pleadings were at issue (R. 9, 6, 22) and following some initial discovery (R. 25-69), the City filed a

motion pursuant to Rule 12(h)(3) Fed. R. Civ. P. suggesting to the district court that it lacked jurisdiction of the subject matter (R. 21). Dicken joined in the motion (R. 24). On June 12, 1970, the district court granted the City's motion and filed a memorandum and order dismissing EJA's complaint for lack of jurisdiction over the subject matter (R. 73-87). The district court held (1) that the locality of the tort was over land because "the 'impact' of the alleged negligence occurred when the gulls disabled the plane's engines" (App. B, *infra,* pp. 36a-37a); and (2) that there was "no relationship between the 'wrong' alleged in this case and some maritime service, navigation or commerce upon navigable waters" (App. B, *infra,* p. 41a).

EJA appealed the dismissal to the Sixth Circuit under 28 U.S.C. § 1291. By a vote of two-to-one the court of appeals affirmed the judgment below. Chief Judge Phillips, writing for the majority, agreed with the district court's holding that "the alleged tort occurred on land, even though the plane fell into navigable waters . . ." (App. A, *infra,* p. 1a); but found it "not necessary to consider the question of maritime relationship or nexus . . ." (App. A, *infra,* p. 6a). In a seventeen page dissent Circuit Judge Edwards disagreed. He noted that in *Weinstein* v. *Eastern Airlines, Inc.,* 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963), the Third Circuit held that the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash was alleged to be tortious conduct which occurred on land. He agreed with the Third Circuit's reasoning in *Weinstein* that such cases are within the admiralty jurisdiction because "When an aircraft

crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels" (*Id.* at 763). He felt that this case required the Sixth Circuit to accept or reject *Weinstein,* and concluded that in his view it "should adopt the Third Circuit rule of *Weinstein, supra*" (App. A, *infra,* p. 25a). In a separate concurring opinion Circuit Judge McCree agreed "as a matter of policy, with much of what Judge Edwards has written in support of the view that 'air ships . . . are within the maritime jurisdiction when they crash on navigable waters' " (App. A, *infra,* p. 8a). However, he concluded that the question was "foreclosed" by this Court's opinions in *The Admiral Peoples,* 295 U.S. 649 (1935) and *Minnie* v. *Port Huron Co.,* 295 U.S. 647 (1935). He therefore joined Chief Judge Phillips in affirming the district court.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Decision in This Case Is in Direct and Irreconcilable Conflict With the Third Circuit's Decision in Weinstein on the Same Matter of Federal Law

As Judge Edwards stated in his dissenting opinion, "This case presents a single important question: Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land?" (App. A, *infra,* p. 8a). He also noted that the Third Circuit "has previously answered this question affirmatively" in the case of *Weinstein* v. *Eastern Airlines, Inc.,* 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963), and reaffirmed their conclusion sitting in banc in the case of *Scott* v. *Eastern Airlines, Inc.,* 399 F.2d 14 (3d Cir.), *cert. denied,* 393

U.S. 979 (1968). Both cases arose out of the crash of a passenger aircraft into the navigable waters of Boston Harbor shortly after takeoff. In *Weinstein* the Third Circuit said:

> The critical factor in determining whether a tort claim comes within the broad statutory grant of admiralty jurisdiction is the situs of the tort; i.e., the place where it happened. If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required.
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> McGuire [*McGuire* v. *City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961)] to the contrary notwithstanding, the weight of authority is clearly to the effect that locality alone determines whether or not a claim is within the admiralty jurisdiction. In Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 34 S.Ct. 733 (1914), the Supreme Court expressly rejected the contention that the tort must, in addition to meeting the locality test, have some connection with a vessel.
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> * * *
>
> Assuming *arguendo* that some kind of maritime nexus in addition to locality is required as a prerequisite to admiralty tort jurisdiction, we believe nonetheless that the cases at bar are within the admiralty jurisdiction insofar as the tort claims alleged therein are concerned. At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and commerce on or across navigable waters. *Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels.* "There can be noth-

> ing more maritime than the sea." Pure Oil Co. v. Snipes, 293 F.2d 60, 65 at n. 6 (5 Cir. 1961).
>
> *Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging.* 316 F.2d at 761, 763 (emphasis added).

In the present case both the district court and the court of appeals answered this same question in the negative. The district court did not try to distinguish *Weinstein*. It simply concluded that it was bound by the Sixth Circuit's "minority position which requires some maritime nexus," rather than by the Third Circuit's rule (App. B, *infra*, p. 33a). See *Chapman* v. *City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967) and *Gowdy* v. *United States*, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969). The court of appeals realized that if it found that the alleged tort occurred over land there was no need to consider the question of maritime nexus. That realization, however, left the court of appeals face to face with the *Weinstein* decision. It resolved the dilemma by "reconciling" the present case with *Weinstein* in the following manner:

> As we read that decision [*Weinstein*], the test for admiralty jurisdiction over torts stated at 316 F.2d at 761 *produces the same result we have reached when applied to the facts of the present case.* (App. A, *infra*, p. 6a, emphasis added).

EJA respectfully submits that the above-quoted statement is erroneous and cannot withstand analysis; and that Judge Edwards' conclusion "that the facts of this case require us to accept or reject *Weinstein*" is the only correct view of this case (App. A, *infra*, p. 11a).

EJA's complaint alleges that its "Falcon was totally destroyed when it crashed and sank in the navigable waters of Lake Erie off shore from the airport . . . (R. 5). The district court admitted that "In ruling on a motion to dismiss for lack of jurisdiction over the subject matter, the allegations of the complaint must be construed most strongly in favor of the plaintiff" (App. B, *infra*, p. 28a). Furthermore, the district court assumed EJA's "position that the damage to the plane from contact with the birds, fence and truck was minimal compared to the total destruction of the aircraft when it 'crashed and sank in the navigable waters of Lake Erie' " (App. B, *infra*, p. 31a). The court of appeals also admitted that EJA's "plane fell into navigable waters" and that "the aircraft was alleged to be a total loss as a result of the soaking in the waters of Lake Erie" (App. A, *infra*, pp. 1a-2a).

Thus, there has never been any question in this case about the following two facts: (1) *EJA's plane crashed into navigable waters,* and (2) *it was totally destroyed when it crashed and sank in those navigable waters.*

The court of appeals reasoned that this case could be reconciled with *Weinstein* because the tort in this case occurred over land when EJA's Falcon hit the seagulls and its engines became crippled; while in *Weinstein* the tort occurred over navigable water when the aircraft crashed into Boston Harbor. To reach such a conclusion one must totally disregard the actual facts of the Boston Harbor crash—facts which are chillingly identical to the facts of this crash. The facts of the Boston Harbor crash are reported in *Rapp* v. *Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa.

1967)—one of the approximately 150 cases brought in federal courts in Philadelphia and Boston as a result of the Boston Harbor tragedy—as follows:

> On October 4, 1960, Eastern Air Lines Flight 375 crashed into the waters of Boston Harbor just outside Logan Airport in Boston, Massachusetts. The plant was on a commercial flight from Boston to Philadelphia. Fifty-nine passengers and the three crewmen were killed; 10 persons survived. The airplane was a Lockheed 188 Electra, a four-engine turbo-prop aircraft. The 501-D-13 engines had been designed and built by General Motors.
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> The flight took off from runway 9 which is 7,021 feet in length. The taxi out to the runway, the take-off roll, the lift-off and the climb were all normal. The aircraft climbed naturally to about 200 feet, when a burst of flame erupted very briefly and quickly from number one engine. After the burst of flame, the aircraft continued to climb for 200-300 feet, reaching a maximum of 400-500 feet, when the number one engine came to a complete stop and the propeller on number one was seen to rotate slowly. The aircraft then made a flat left turn and returned to its original heading parallel to the runway. Thereafter, the plane made another flat turn, the nose went up and it began to climb, after which it went into a steep left bank, with the right wing high. The crash followed. *A total of 47 seconds had elapsed from the take-off to the time of the disaster.*
>
> *The plane met a flight of starlings about 6/10ths of a mile from the beginning of the runway. Estimates of the amount of dead starlings found on the runway varied from 50 to 100. Five to ten dead gulls were also found in the same general area. A sufficient amount of bird material had penetrated into the air inlet of the plane as to cause the auto-feathering device to shut off number one engine or so as to cause a flameout and the crew to shut*

> *off number one engine. At any rate, the ingestion of the birds into the air inlet caused the number one engine to shut off.* (264 F. Supp. at 675; emphasis added)

The facts of the Boston Harbor crash, as reported in *Rapp,* were presented to both the district court and the court of appeals in this case by EJA. In reply, the City could only argue that these facts should be disregarded by the court of appeals because they did not appear in the *Weinstein* decision. Apparently, Judge McCree found that to be a persuasive argument for he states in his concurring opinion, "Neither in that court's opinion [*Weinstein*], nor in the opinion of the District Court whose judgment it was reviewing, 203 F. Supp. 430 (E.D. Pa. 1962), is there a finding where the impact of the tortious conduct was first evidenced—over land or over sea" (App. A, *infra,* p. 7a). Judge Edwards was not so persuaded because he found a clear and irreconcilable conflict between the facts in this case and the holding in *Weinstein.* EJA submits that this is the only correct view and the only way courts should approach the practical problems of solving questions brought before them. Judges need not restrict their vision to the four corners of one reported decision while refraining from reading another. It seems preposterous to argue, as the City did here, that courts should totally disregard the reported facts of the Boston Harbor crash when deciding this case.

The simple truth is, in *Weinstein* the Third Circuit was faced with the question of whether a case involving the crash of an aircraft into navigable territorial waters was cognizable in admiralty. The airplane had crashed shortly after takeoff because it

became "crippled" over land when birds were ingested into its jet-powered engines. It "fortuitously" crashed in navigable waters nearby. Nevertheless, the Third Circuit held that such a case was within the jurisdiction of admiralty. In view of the amazing similarity between the facts in this case and the facts of the Boston Harbor crash, there is no escape from the conclusion that the Sixth Circuit's decision here is in direct and irreconcilable conflict with the Third Circuit's decision in *Weinstein.*

One of the prime purposes of the certiorari jurisdiction of this Court is to bring about uniformity of decisions on the same matter of federal law among the federal courts of appeal, and this Court has often granted review to resolve irreconcilable conflicts between decisions of the courts of appeal. See, *e.g.*, *Avco Corp.* v. *Aero Lodge No. 735 I.A.M. & A.W.*, 390 U.S. 557 (1968), and *Northeastern Pennsylvania National Bank & Trust Co.* v. *United States*, 387 U.S. 213 (1967). EJA submits that such a conflict exists here and that certiorari should be granted in this case to bring about uniformity in the decisions of the courts of appeal on this matter of federal law.

II. The Question of Federal Law Involved Here Is An Important One Which Has Not Been, But Should Be, Settled by This Court

In his dissenting opinion in this case Judge Edwards states:

> ... There are legal and policy questions of great portent for the future which this case requires us to answer. I believe that the facts of this case require us to accept or reject *Weinstein, supra,* and thus, to decide for this Circuit whether air ships, which are increasingly displacing water-

> borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters (App. A, *infra,* p. 11a).

To explain this statement Judge Edwards reviews in his opinion the historical scope of admiralty jurisdiction, the statutes which indicate that Congress has long "recognized maritime jurisdiction over aircraft flying over, resting upon, or crashing into navigable waters" (App. A, *infra,* p. 12a), this Court's cases concerning the scope of maritime jurisdiction, the admiralty cases in the Sixth Circuit, the *Weinstein* case and the facts of this case. EJA submits that Judge Edwards' dissenting opinion is a thorough, scholarly, well-reasoned and correct statement of the law in this area and adopts it without reservation in connection with this petition. For brevity, EJA will not repeat and quote extensively from Judge Edwards' dissent in this petition, but will rely instead upon this Court's careful reading of it in the Appendix hereto. A few additional matters concerning the importance of the question of federal law here involved should be noted.

Aircraft are fast replacing ships as the primary means of travel across navigable waters. The 1969 edition of the Federal Aviation Administration's Statistical Handbook of Aviation states that during calendar year 1968 approximately 140.5 million passengers enplaned on this country's certified air carrier fleet (p. 6). While all of these passengers did not travel over navigable waters, some 5.5 million of them traveled by air to Europe alone (*Id.* p. 91). Furthermore, it is a matter of common knowledge that most airports serving metropolitan areas on the coasts and the Great Lakes are located near navigable water. It is also a known fact that the majority of aircraft acci-

dents occur during landings and takeoffs. Finally, it is a matter of common knowledge to the judiciary that a high percentage of aircraft accidents result in litigation in the courts. The upshot of all this is that there have been, and will unquestionably continue to be, a large number of cases involving aircraft crashes into navigable water where the cause of the crash is alleged to be tortious conduct which occurred on land. See, *e.g.*, *Harris* v. *United Air Lines, Inc.*, 275 F. Supp. 431 (S.D. Iowa 1967) and *Thomas* v. *United Air Lines, Inc.*, 24 N.Y. 2d 714, 249 N.E. 2d 755 (1969), cases arising out of the crash of a Boeing 727 jet which "fortuitously" crashed into the navigable waters of Lake Michigan within the territorial boundaries of the State of Illinois; *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85 (N.D. Calif. 1954), a case involving a crash east of Wake Island; *Noel* v. *Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958), where tortious acts committed on land caused an airliner to explode and burn in mid-air off the coast of New Jersey and the aircraft went out of control and crashed into the sea; and *Hornsby* v. *The Fishmeal Co.*, 285 F. Supp. 990 (W.D. La. 1968), *rev'd on other grounds*, 431 F.2d 865 (5th Cir. 1970), where two light planes collided in mid-air over the Gulf of Mexico within one marine league of the Louisiana shore.

In all such cases which have arisen in the past, and in all similar cases to arise in the future, the threshold question must be—is the tort involved a maritime one? It is important to note that this quesion *must* be answered whether jurisdiction is based upon admiralty or not. Thus, if the tort is a maritime one the federal general maritime law is the substantive law to be applied rather than state law, whether the case is brought

in federal court on the admiralty side, in federal court on the "law side" on the basis of diversity (or against the government under the Federal Tort Claims Act), or in a state court under the "savings clause" (28 U.S.C. § 1333(1)). *Hess* v. *United States,* 361 U.S. 314 (1960).

Until the Sixth Circuit's decision in this case, *every* case involving the crash of an aircraft in navigable waters had been held to be within admiralty jurisdiction,[6] even where the cause of the crash was alleged to be tortious conduct which occurred on land. Those cases coming after *Weinstein* cited and followed the Third Circuit's decision in that case.[7] This was so despite criticism leveled at *Weinstein* by the American Law Institute in its STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).[8] Actually, the ALI's criticism of *Weinstein* stemmed from the problem involved in "borrowing" a state's substantive law in those death cases where the aircraft crashed in navigable territorial waters and the Death on the High Seas Act[9] (DOHSA) was inapplicable. See, e.g., *Scott* v. *Eastern Airlines, Inc.,* 399 F.2d 14 (3d Cir.), *cert. denied,* 393 U.S. 979 (1968). Those problems have now been laid to rest by this Court's decision in *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375 (1970), which recognized a remedy for wrongful death under the general maritime law.

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[6] See, *e.g.,* the cases cited in Judge Edwards' dissenting opinion at p. 26a (App. A, *infra*).

[7] See, *e.g.,* the cases cited in Judge Edwards' dissenting opinion at p. 9a, n.1 (App. A, *infra*).

[8] See pp. 231-234 of that study.

[9] 46 U.S.C. § 761.

It is clear that since *Moragne* the courts (except for the Sixth Circuit's decision in this case) have continued to find that cases involving aircraft crashes in navigable water are within the jurisdiction of admiralty. See, *e.g.*, *Hornsby* v. *The Fishmeal Co.*, 431 F.2d 865 (5th Cir. 1970); *Dugas* v. *National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971) (crash of private airplane at sea); *Leroy* v. *United Air Lines, Inc.*, 11 Av. Cas. ¶ 17,919 (Ill. Cir. Ct. 1970) (crash of a Boeing 727 in Santa Monica Bay shortly after takeoff from Los Angeles International Airport); and *Kropp* v. *Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D.N.Y. 1971) (action against manufacturer of Navy jet bomber to recover for death of crewman who fell from the aircraft over the high seas).

Defining the scope of admiralty jurisdiction to include aircraft crashes in navigable waters is also important to the efficient judicial administration of such cases. At first blush the Sixth Circuit's holding in this case might seem attractive to those holding a restrictive view of the jurisdiction of federal courts. Thus, in this very case one might conclude that the state court in Cleveland would be the most appropriate forum to deal with this case rather than the federal court there. Such an approach completely ignores the actual realities involved in aviation accident litigation. For example, in this case the Sixth Circuit has not reduced the work load of the district court in Cleveland; it has simply multiplied litigation by causing both the district court and the state court in that city to litigate the same issues of fact. That is, the United States (respondent Dicken's employer) could be sued here only in federal court.[10] Thus, if the Sixth Cir-

[10] 28 U.S.C. § 1346(b).

cuit's opinion stands in this case EJA will not be able to have a joint trial against both tortfeasors in federal court, but will be forced to litigate its Tort Claims action against the government in federal court and conduct an identical law suit against the City in state court "across the street." [11]

This phenomenon is a daily problem in aviation accident litigation because of the government's pervasive involvement in all aspects of aviation—such as air traffic control, regulation of air carriers and aircraft manufacturers, licensing of pilots, etc. A federal forum in aviation accident cases involving major accidents allows the litigants possible access to the Panel on Complex and Multidistrict Litigation (and transfer for discovery) under 28 U.S.C. § 1407; transfer for discovery and trial under 28 U.S.C. § 1404(a); and the ability to join the United States as a defendant or a third-party defendant. The application of federal general maritime law in admiralty cases insures uniformity of decisions and uniformity of results in multiparty cases, and eliminates complex choice of law problems. These everyday aspects of litigation do not escape the practitioner's notice in this field, and they undoubtedly account for the large number of aviation accident cases being litigated in federal courts. The fact is, the Sixth Circuit's opinion here will *not* relieve the workload of the federal courts; it will simply multiply litigation and increase the workload of the entire court system—state and federal.

EJA submits that the matter of federal law involved in this case is an extremely important one, not only for the petitioners here, but for many, many liti-

[11] There is no diversity between EJA and the City.

gants in aviation accident cases in years to come. As noted by Judge Edwards, "there is no precedent squarely in point concerning airplane crashes in navigable waters of a state . . . from the United States Supreme Court" (App. A, *infra*, p. 26a). For these reasons this Court should grant certiorari to resolve the conflict between the Sixth Circuit's decision in this case and the Third Circuit's decision in *Weinstein*.

III. The Sixth Circuit's Ruling on This Important Matter of Federal Law Is Such a Departure From All Prior Authority As To Call for the Exercise of This Court's Power of Supervision

In addition to *Weinstein, supra,* and this case, there are many, many lower court cases—both state and federal—involving aircraft crashes into navigable waters. In *every* such case that can be found the holding has always been the same: aircraft crashes in navigable waters are within the jurisdiction of admiralty. See, *e.g., Hornsby* v. *Fishmeal Co.,* 285 F. Supp. 990 (W.D. La. 1968), *rev'd on other grounds,* 431 F.2d 865 (5th Cir. 1970); *Rapp* v. *Eastern Airlines, Inc.,* 264 F. Supp. 673 (E.D. Pa. 1967), *aff'd sub nom. Scott* v. *Eastern Airlines, Inc.,* 399 F.2d 14 (3d Cir.), *cert. denied,* 393 U.S. 979 (1968); *Horton* v. *J & J Aircraft, Inc.,* 257 F. Supp. 121 (S.D. Fla. 1966); *Montgomery* v. *Goodyear Tire & Rubber Co.,* 231 F. Supp. 447 (S.D.N.Y. 1964), *aff'd,* 392 F.2d 777 (2d Cir. 1968); *Harris* v. *United Airlines,* 275 F. Supp. 431 (S.D. Iowa 1967); *Stiles* v. *National Airlines, Inc.,* 161 F. Supp. 125 (E.D. La. 1958), *aff'd,* 268 F.2d 400 (5th Cir.), *cert. denied,* 361 U.S. 885 (1959); *Noel* v. *Airponents, Inc.,* 169 F. Supp. 348 (D.N.J. 1958); *Bergeron* v. *Aero Associates, Inc.,* 213 F. Supp. 936 (E.D. La. 1963); *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85 (N.D.

Cal. 1954); *Krause* v. *Sud-Aviation, Société Nationale de Constr. Aero.*, 301 F. Supp. 513 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 428 (2d Cir. 1969); *King* v. *Pan American World Airways*, 166 F. Supp. 136 (N.D. Cal. 1958), *aff'd*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960); *Fernández* v. *Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D.N.Y. 1957); *Higa* v. *Transocean Airlines*, 124 F. Supp. 13 (D.C. Hawaii 1954); *Lacey* v. *L. W. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. Mass. 1951); *Dugas* v. *National Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971); *Leroy* v. *United Air Lines, Inc.*, 11 Av. Cas. ¶ 17,919 (Ill. Cir. Ct. 1970); *Thomas* v. *United Air Lines, Inc.*, 24 N.Y.2d 714, 249 N.E.2d 755 (1969); *accord, Kropp* v. *Douglas Aircraft Co.*, 319 F. Supp. 447 (E.D.N.Y. 1971).

The above list is not meant to be complete. It is meant to illustrate that the Sixth Circuit's decision in this case *stands alone* against a tremendous volume of authority holding to the contrary. The *only* case which can be found that reaches a conclusion similar to the Sixth Circuit's decision here is the case of *Weinstein* v. *Eastern Airlines, Inc.*, 203 F. Supp. 430 (E.D. Pa. 1962), the district court case which the Third Circuit reversed in *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963). The district court in *Weinstein* concluded that "... admiralty jurisdiction does not encompass tortious causes of action arising from crashes of airplanes into the navigable waters of a state...." 203 F. Supp. at 431. In rejecting that narrow view of the scope of admiralty jurisdiction the Third Circuit said:

> At the time the Constitution was framed and for a century and a half thereafter, ships of various kinds were the only means of transportation and

> commerce on or across navigable waters. Today, aircraft have become a major instrument of travel and commerce over and across these same waters. When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels.
>
> Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging. 316 F.2d at 763.

The Third Circuit's ruling in *Weinstein* has been cited and followed many, many times since it was pronounced in 1963. Despite this volume of authority to the contrary, the Sixth Circuit in its opinion in this case did not discuss a *single* case involving the crash of an aircraft into navigable waters, with the exception of *Weinstein*. Instead, it found that this case was controlled by three opinions from this Court; two workmen's compensation cases dating back to 1928[12] and 1935,[13] and a 1935 case involving injury to a ship's passenger.[14] The Sixth Circuit used these three cases to reach its conclusion as to the locality where the tort in this case occurred.

EJA will not belabor this Court with a discussion of the merits of this kind of approach to the solution of an important question of federal law—whether the scope of admiralty jurisdiction encompasses cases involving aircraft crashes into navigable waters. Suffice it to say, as Judge Edwards points out in his dissent, "I make no suggestion that there is a simple con-

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[12] *Smith & Son* v. *Taylor*, 276 U.S. 179 (1928).

[13] *Minnie* v. *Port Huron Co.*, 295 U.S. 647 (1935).

[14] *The Admiral Peoples*, 295 U.S. 649 (1935).

sistency to be found in the reasoning of all these cases [*Smith & Son, supra; Minnie, supra;* and *The Admiral Peoples, supra*]. Harsh facts frequently appear to have affected results" (App. A, *infra,* p. 15a).

In *Thomson* v. *Chesapeake Yacht Club, Inc.,* 255 F. Supp. 555 (D. Md. 1965), Chief Judge Thomsen noted a similar difficulty in trying to fit every case into a neat pattern. He said:

> It is difficult, if not impossible, to reconcile the opinions in such cases as . . . *Wiper* [*Wiper* v. *Great Lakes Engineering Works,* 340 F.2d 727 (6th Cir. 1955)] with the opinions in the . . . aircraft cases.
>
> * * *
>
> The aircraft cases present special problems. Although the negligence may have occurred on land, where there was negligent maintenance, the impact (effect) of the negligence on the passengers did not occur until something went wrong during the flight and the plane started to fall. Something may have started to go wrong over the land before the plane reached the sea, but that is usually impossible to prove one way or the other in aircraft cases, *and the decisions adopt a practical approach.* (255 F. Supp. 557, 558; emphasis added.)

EJA submits that the court of appeals here did not adopt a practical approach, and that by mechanically applying certain language from old workmen's compensation cases to reach a conclusion in a case involving the crash of an aircraft into navigable waters, the Sixth Circuit has fashioned a totally unworkable rule for future aircraft cases. The Sixth Circuit has decided that the locality of the tort in an aviation case is not where the aircraft crashes, but where the aircraft first becomes "crippled." Apart from the diffi-

culties of locating such a point, it can also be seen that the rule may apply only to the aircraft, rather than to the people inside, who may not become injured in any way until the aircraft crashes. In this very case, for example, if EJA's crew had been killed or injured their death or personal injury cases would clearly have been cognizable in admiralty. See *Moragne* v. *States Marine Lines, Inc., supra.* Thus, the Sixth Circuit's rule here means that state law will apply to the action brought to recover damages for loss of the aircraft, and federal maritime law will apply to the death and injury claims brought by the passengers and crew or their beneficiaries. This could also result in the need for simultaneous multiple litigation in state and federal courts. The result is confusion, unnecessary complexity and unreality. In this case, for example, it makes no sense to say that EJA's claim for the *total* destruction of its aircraft occurred when the plane first struck the birds, rather than when it crashed and sank in the navigable waters of Lake Erie.

In short, the Sixth Circuit's opinion in this case is clearly erroneous, it is in direct conflict with the Third Circuit's rule in *Weinstein,* and contrary to *every* case that can be found involving aircraft crashes into navigable waters. There is no possibility that this erroneous decision will be rectified by subsequent litigation. Therefore, prompt action by this Court is required for its reversal. While it is true that this Court does not sit solely for the purpose of correcting errors made by courts of appeal, where there is a conflict among the decisions of the courts of appeal on an important matter of federal law—such as the scope of admiralty jurisdiction—and the decision in question is clearly a questionable one, this Court has granted cer-

tiorari. See, *eg, Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Williams* v. *Lee*, 358 U.S. 217 (1958).

EJA submits that the Sixth Circuit's ruling in this case is such a departure from all the authority holding that aircraft crashes in navigable waters are within admiralty jurisdiction as to call for the exercise of this Court's supervision, and that certiorari should therefore be granted in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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